No. 3942

United States Circuit Court of Appeals

For the Ninth Circuit

MARY ROGULJ,

Appellant,

vs.

ALASKA GASTINEAU MINING COMPANY (a corporation),

Appellee.

Upon Appeal from the District Court for Alaska, Division Number One.

BRIEF OF APPELLEE.

H. L. FAULKNER,
Attorney for Appellee.

W. S. BAYLESS,
Of Counsel.

No. 3942

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MARY ROGULJ,

Appellant,

vs.

ALASKA GASTINEAU MINING COMPANY (a corporation),

Appellee.

Upon Appeal from the District Court for Alaska, Division Number One.

BRIEF OF APPELLEE.

Statement of the Case.

Peter Rogulj entered the employ of the defendant and appellee September 7, 1915, and on the same day signed a written statement, as required by the provisions of the Workmen's Compensation Act of Alaska, showing, among other things, that he was not married, that he had no children, that his father was dead and that he had a stepmother named Mary Rogulj, aged sixty-three, who was then living at Podaca, Austria. (Tr. of Rec., p. 20.)

On the 30th of November, 1915, Peter Rogulj died from an injury received while in the employ of de-

fendant, and on the 2nd of December, 1915, within ten days from the date of his death, defendant mailed a notice, in the form specified by the act, by registered mail, in the United States Post Office, Juneau, Alaska, to Mary Rogulj, plaintiff and appellant herein, at Podaca, Austria, the address given in deceased's statement, informing her of the injury and death of decedent and notifying her that all persons entitled to benefits on account of such injury and death were required to serve notice upon defendant within 120 days from November 30, 1915, in accordance with the provisions of the laws of Alaska upon that subject, and that failure to serve such notice within the time and in the manner specified would result in depriving the beneficiary of her rights to compensation. (Tr. of Rec., p. 22.)

Neither plaintiff nor anyone in her behalf filed with defendant within 120 days from November 30, 1915, as required by the act, any written notice stating her address, her relationship to Peter Rogulj, deceased, and that she was dependent upon the earnings of deceased. (Tr. of Rec., pp. 21, 23.)

Exactly two years later on November 30, 1917, plaintiff commenced this action, and in her complaint alleged, among other things, that she had served a notice in writing upon the defendant, setting forth that she was the beneficiary of Peter Rogulj and dependent upon him for support and that she had demanded of defendant the sum of Twelve Hundred Dollars due her as such beneficiary. (Tr. of Rec., p. 1.)

In its answer, defendant denied, among other things, that plaintiff was the beneficiary of Peter Rogulj, deceased, denied her dependency and denied that she had served upon defendant the written notice referred to in the complaint. For a further answer and affirmative defense, defendant alleged, among other things, that at the time Peter Rogulj, deceased, entered the employ of defendant, he furnished defendant with the statement above mentioned, and that within ten days from the date of the accident, defendant had mailed to plaintiff, in accordance with the provisions of the act, at the address given by the deceased in said statement, to-wit: Podaca, Austria; a notice of the death of Peter Rogulj, with a request that she file her claim for compensation, if any, and further alleged that no claim for compensation had been filed with defendant nor with anyone in its employ by plaintiff nor by anyone in her behalf within 120 days from the date of the death of Peter Rogulj nor at any other time. (Tr. of Rec., p. 5.)

Three years later plaintiff, on September 30, 1920, filed a reply admitting all the allegations of the affirmative defense in defendant's answer except the allegation that defendant had mailed to plaintiff its notice of the death of Peter Rogulj, which was denied. For a further reply to defendant's affirmative defense, plaintiff alleged, in substance, (1) that, owing to the existence of the state of war in Europe and the interruption of all communications with Austria, where she resided, she had no knowledge of

the death of Peter Rogulj, and no means of obtaining such information within 120 days from the accident; (2) acts on the part of defendant expressly waiving notice in writing of plaintiff's claim for compensation; (3) acts on the part of defendant whereby it was estopped from claiming or pleading as a defense the failure of plaintiff to give such notice. (Tr. of Rec., p. 8.)

Defendant's demurrer to plaintiff's affirmative reply having been sustained, plaintiff filed an amended reply admitting all the allegations of the answer except the allegation that Peter Rogulj, deceased, had designated Mary Rogulj, his stepmother, address Podaca, Austria, as his beneficiary in his statement which he furnished to defendant at the time he entered its employ (admitted in reply), the allegation that defendant had mailed its notice to plaintiff at such address, by registered mail, within ten days from the date of the accident (admitted in reply) and the allegation that no claim for compensation had been filed within 120 days, which allegations plaintiff denied. (Tr. of Rec., p. 15.)

At the trial in the District Court, plaintiff submitted testimony to prove her dependency and rested. (Tr. of Rec., p. 19.)

Defendant then submitted a stipulation that Peter Rogulj had furnished defendant with the above mentioned statement; also testimony (which was not contradicted) that the defendant, within ten days from the date of the death of Peter Rogulj, had mailed the notice required by the act to plaintiff

at her given address; also that the notice was properly registered; also that no claim for compensation was made by plaintiff to defendant within the 120 day period. Defendant then rested. (Tr. of Rec., pp. 20-23.)

Plaintiff then offered testimony tending to show that her address was different from the address given by Peter Rogulj in his statement to the defendant. (Tr. of Rec., p. 24.)

The court sustained defendant's objection to this testimony and then instructed the jury to return a verdict for defendant. The jury accordingly having returned a verdict for the defendant and judgment having been entered thereon, this appeal was taken. (Tr. of Rec., p. 25.)

Plaintiff in her assignments of error raises three questions for decision here relative to the rulings of the trial judge in

(1) Sustaining defendant's demurrer to plaintiff's reply.

(2) Excluding testimony that plaintiff's address was different from that given by Peter Rogulj, deceased, in his statement to defendant.

(3) Instructing the jury to return a verdict for the defendant.

Argument.

The first assignment of error relates to the order of the court in sustaining defendant's demurrer to plaintiff's affirmative reply.

The reply admitted failure on the part of plaintiff to serve upon defendant, within 120 days from November 30, 1915, the date of the death of Peter Rogulj, the notice of plaintiff's dependency and claim for compensation, but alleged as an excuse, first, the existence of a state of war in Europe and the interruption of all communications, which prevented the notice from being served; second, waiver of the notice by the defendant; and, third, estoppel by defendant to claim or plead as a defense such failure to give the notice.

The Alaska Workmen's Compensation Act, Sessions Laws of 1915, Chapter 71, Section 9, page 156, provides:

> "In all cases where any person claims to be a beneficiary under this Act entitled to compensation because of an injury to an employee coming within its provisions, which resulted in his or her death, such beneficiary, or someone in his or her behalf shall within one hundred and twenty (120) days from and after the death of such employee serve a written notice upon the employer, which notice shall contain the name and address of the person claiming to be such beneficiary, the relationship existing between such beneficiary and the deceased, and if such beneficiary shall be either the father or mother of the deceased, such notice shall also contain a statement showing that such person was dependent upon the earnings of the deceased. Such notice shall be liberally construed and no claim for compensation shall be denied because of any defect in the notice, provided it appears that a notice was served with a bona fide intention to comply with the provisions of this Act. Such notice may be served by any person of legal age by delivering a copy thereof

to the employer or the employer's agent, in person, or, by leaving a copy thereof at the employer's principal place of business within the Territory of Alaska with some person over the age of eighteen (18) years in the employ of such employer. If the employer cannot be found within the Territory and has no known agent or place of business therein, such beneficiary may serve such notice by publishing the same in one issue of any newspaper of general circulation published in the judicial division where the injury, out of which the right to compensation arose occurred; Except in the cases in this section otherwise expressly provided, no action or other proceeding to recover such compensation shall be brought or maintained, nor shall any claim for such compensation be filed or allowed as hereinafter provided unless such notice shall have been served in the manner and within the time herein provided."

A notice of dependency and claim for compensation is similar in principle to a notice of the time, place and cause of injury.

Under particular statutes, notably Employers' Liability and Workmen's Compensation Acts, the general rule is that the giving of the prescribed notice is a condition precedent to the existence of the cause of action unless excused by circumstances which the statute permits to operate as an excuse.

17 Corpus Juris, page 1196 (No. 45) 2, and cases cited.

"Since the right of action is wholly statutory and must be taken with all the conditions imposed upon it, the burden being upon plaintiff to bring himself within the requirements of the statute, and although a contrary view

has been taken, it is generally held that a provision in the statute creating the right requiring an action thereon to be brought within a specified time is more than an ordinary statute of limitations and goes to the existence of the right itself, the right given being one to sue within the specified time, and not otherwise. Accordingly, no action brought after the expiration of the specified time can be maintained, and except as provided by the statute, no exception can be permitted to excuse delay. The court cannot add a saving clause or create an exception where the statute contains none * * *."

17 Corpus Juris, page 1235, 1236 (No. 83) 2. See also 8 R. C. L., page 805, No. 83.

The Harrisburg, 119 U. S. 199.

Amer. R. Co. v. Coronas, 230 Fed. 545, L.R.A. 1916E 1095;

Partee v. St. Louis, etc., R. Co., 204 Fed. 972, 51 L.R.A. (N. S.) 721;

Giersch v. Atchison, Topeka, etc., R. Co. 16 A. L. R. 470;

Dochoff v. Globe Construction Co., 180 N. W. 414;

Schild v. Pere Marquette R. Co., 166 N. W. 1018;

Kalucki v. American Car & Foundry Co., 166 N. W. 1011;

Cooke v. Holland Furnace Co., et al., 166 N. W. 1013;

Dane v. Michigan United Traction Co., 166 N. W. 1017.

In the case of In re Murphy (Mass. 1917) 115 N. E. 40, the court said:

"Notice in writing must be given by the employee before he can recover under the Act,

> and the necessity of such a notice is not a mere technicality. It is esential to his rights. Doubtless the legislature could have dispensed with this condition or could have insisted upon a mere oral notice. The statute expressly requires a written notice. The giving of such a notice is a part of the plaintiff's case and the burden of proof rests upon him; it is not a matter of defense resting upon the employer * *."

The claim for compensation will be rejected if the notice of the claim is defective since the provisions of the statute must be substantially complied with.

> Welch v. Waterbury (N. Y. 1912) 100 N. E. 426;
>
> Fidelity & Casualty Co., et al., v. Industrial Accident Commission of California (Cal. 1918) 170 Pac. 1112.

The first affirmative allegation of the reply, in substance, is that owing to the state of war prevailing throughout Europe at the time of the death of Peter Rogulj (November 30, 1915) and the interruption of all communications both by mail and cable, plaintiff had no knowledge of the accident and no means of obtaining such information within 120 days from such accident at her residence in Austria, which, later on in the reply, she designates as Podaca, Austria.

The court will take judicial notice of the fact that no state of war existed between the United States and Austria, or between the United States and any other country in 1915. The United States declared

war against Germany in April, 1917, and against Austria in the fall of 1917, about two years after the death of Peter Rogulj. Communication with Austria in 1915, while somewhat slower than in times of peace, was possible and more or less regular.

However, under the act, it was not necessary for plaintiff personally to notify defendant of her dependency upon the deceased and to claim compensation within 120 days from November 30, 1915, since anyone could file such a written notice and claim in her behalf. Her stepson Matt Rogulj was in Juneau, Alaska, where the defendant's office and principal place of business in the Territory are located, not only at the time of the accident, but also during the pendency of the case in District Court, verified plaintiff's pleadings herein and could have served the notice.

In the case of In re Gorski, 116 N. E. 811, brought under the Massachusetts statute, which provided that no proceedings for compensation should be maintained unless the claim for compensation was made within six months after the occurrence of the injury, or within six months after death, and that failure to make a claim within this period should not bar proceedings if occasioned by mistake or other reasonable cause, the court refused to allow the claim of a widow residing in Poland for compensation for the death of her husband in 1914, since the claim, due to the interruption of communi-

cations caused by the war in Europe, was not made within the statutory period, saying:

> "Neither ignorance of the law nor simple absence from the country constitute reasonable cause for failure to make the claim seasonably. That is settled. McLean's case, 223 Mass. 342, 111 N. E. 783."

In Poccardi v. Ott, 98 S. E. 69, decided by the Supreme Court of West Virginia in 1919, the claim of a beneficiary of a deceased employee was held to be barred for failure to give the required notice within the statutory period, although the claim, after having been signed by the beneficiary, who resided in Italy, was delayed in transmission on account of the existence of a state of war, not between the United States and Italy, but between them and the Central Powers. The court said:

> "On the first proposition, it is sufficient to answer that the statute makes no exception in favor of delayed applications; it is imperative. To entitle the applicant to participate in the compensation fund, he must substantially comply with the statute. * * * The English act * * * suspends the statute of limitations under certain circumstances, such as mistake, absence and other causes. But our statute contains no such provision, and such provisions cannot be interpolated under the most liberal rules of construction."

And in Industrial Association of Colorado, et al., v. Peppas, 204 Pac. 664, decided in 1922, the Supreme Court of Colorado held that the claim of a widow, residing in Greece, was barred and that she was not excused from giving written notice to the

employer company, which was required to be given within one year from the date of the accident, even though Greece was blockaded during the war and she had no knowledge of the accident.

In view of the foregoing, it would appear that the failure of plaintiff to file her claim for compensation on account of the existence of a state of war was not excused.

The second affirmative allegation of the reply, in substance, is that defendant by its acts waived notice of the claim of plaintiff for compensation.

There is a real distinction between waiver and estoppel, as noted in 40 Cyc. 256, viz:

> "* * * Waiver is the voluntary surrender of a right, estoppel is the inhibition to assert it from the mischief that has followed. Waiver involves both knowledge and intention; and estoppel may arise where there is no element to mislead; waiver depends upon what one himself intends to do; estoppel depends rather upon what he caused his adversary to do; waiver involves the acts and conduct of only one of the parties, estoppel involves the conduct of both. A waiver does not necessarily imply that one has been misled to his prejudice or into an altered position, an estoppel always involves this element. * * *"
>
> "By waiver is meant the intentional relinquishment of a known right or such conduct as warrants the relinquishment of such a right. Therefore, in order to constitute waiver, the person against whom the waiver is claimed must have full knowledge of his rights and of facts which will enable him to take effectual action for the enforcement of such rights. 29

Am. & Eng. Ency. Law, page 1091, and authorities. * * *"

State ex rel. Birchmore v. State Board of Canvassers, 14 L. R. A. (N. S.) 850, 855.

See also 27 R. C. L. Pages 906, 907, 908, 909.

Under the Vermont statute, which required notice and claim in writing to be made before an action for compensation could be maintained before the Commissioner of Industries, it was held that the making of a claim for compensation was necessary to give the Commissioner jurisdiction and could not be waived, full performance of the conditions of the act being essential requisites to the jurisdiction of the Commissioner, his authority and the statutory limitations upon the exercise of it cannot be enlarged, diminished or destroyed by express consent or waived by acts of estoppel.

Petraska v. National Acme Co., 113 Atl. 536.

In Dailey v. Stoll, 105 N. E. 87, the claim was made that the defendant waived the statutory notice because an alleged agent of defendant advised him not to have anything to do with lawyers, said plaintiff would be notified to come to defendant's office and that the defendant would settle with him; but that by the time he received his notice to go to the office, the 120 days had gone by. However, the court held the notice had not been waived.

In Georgia Casualty Co. v. Ward, 220 S. W. 380, the court held that the statutory provision requir-

ing the filing of a claim for compensation within six months is mandatory and a compliance with the requirements thereof is indispensable to the exercise of the right to maintain proceedings to compel the payment of compensation and this provision was not waived on account of letters written by the company agents to plaintiff's attorneys requesting them to have a claim for compensation blank filled out and to advise the agents as to the amount of compensation he was claiming, etc.

In the case of Ohio Oil Company v. Industrial Commission, 127 N. E. 743, it was contended that since the defendant had made payments to the plaintiff, the notice and the claim had been waived; but the court held that such payments, having been made voluntarily, were in the nature of a gratuity and did not constitute a waiver, saying:

> "The notice within thirty days and the claim for compensation within six months are jurisdictional and an award cannot be sustained in the absence of evidence of a compliance with these requirements of the statute."

It has also been held that failure to make out a claim for compensation within the statutory period because plaintiff could not speak, write or understand English and also because, on account of his injury, he was physically unable to do so, was not excused.

> Podkastelnea v. Michigan Central R. Co. 164 N. W. 418.

Concealment of facts by the defendant as to the manner and cause of death until after the statutory

period has likewise been held not to be sufficient to prevent the running of the statute.

Kerley v. Hoehman, 8 A. L. R. 141.
See also Alvarado v. Southern Pacific Co., 193 S. W. 1108.

In appellant's brief, page 13, three decisions are cited on the proposition of waiver, which are distinguishable from the instant case, viz.:

Roberts v. Chas. Wolff Packing Co., 149 Pac. 413;
F. R. Conway Co. v. Industrial Board of Illinois, et al., 118 N. E. 705;
Smith v. Heine Safety Boiler Co., 112 A. 519.

In the Roberts case, supra, the Kansas Statute provided that the absence of notice should not be a bar unless the employer had been thereby prejudiced or if the failure to make a claim was occasioned by mistake, physical incapacity, or other reasonable cause, and the court found as facts from the evidence that there was reasonable cause for its delay since the defendant had asked that judgment be awarded to plaintiff and against defendant for limited sums, provided it was awarded in the form of periodical payments.

In the Conway case, supra, the court held that under the Illinois statute, it was unnecessary for the claim for compensation to be in writing, a verbal claim being sufficient, and, further, that the injured employee in the case had actually made a verbal claim for compensation.

In the Smith case, supra, the court held that the notice of the accident need not be in writing and that it was conceded verbal notice had been given.

Incidentally, the court also held that in view of defendant's letters admitting knowledge of the accident and liability therefor, defendant waived notice.

The affirmative allegations in the reply relative to waiver are immediately followed by allegations of estoppel, indicating the waiver was not made with the intention of relinquishing any rights. Under the above cited authorities, it is necesary that waiver to be effective must be made voluntarily and intentionally. However, as plead in the reply, the allegations of estoppel negative the allegations of waiver.

The third affirmative allegation in the reply refers to acts constituting estoppel on the part of the defendant.

It will be noted that the reply contains no allegations that there was a necessity for plaintiff to rely upon the alleged false statements of the defendant, and that plaintiff was free from negligence and that plaintiff was not in a position to use her own judgment or to prosecute her own inquiries in order to ascertain the truth. Under such a pleading, an estoppel cannot be maintained.

See:

Bigby v. Powell, 71 Amer. Dec. 168;
Gee v. Moss, 68 Iowa 318;
Newson v. Jackson, 71 Amer. Dec. 206;
Eames v. Morgan, 37 Ill. 260.

However, even if plaintiff relied upon fraudulent representations alleged to have been made to him by defendant, the defendant is not thereby estopped

from asserting or setting up statute of limitations as a bar to plaintiff's cause of action.

Bement v. Grand Rapids & I. R. Co., 194 Mich. 64; 160 N. W. 424; L.R.A. 1917E 322.

In this case the court said:

"A positive distinction seems to be made between cases in which the limitation of time for bringing suit is contained in the statute which creates the liability and the right of action and general statutes of limitations of the right of action existing under other statutes or under common law. In the former, the limitation of time is a limitation of the right and, as has been said, the suit cannot be maintained if not brought within the time limited. In the latter, the limitation of time for bringing suit is a limitation of the remedy only, and it has been held that under such general statutes of limitations, the defendant may be estopped from the benefit of the statute by an agreement waiving it or by concealment or by fraud. The statute here in question creates a new liability and takes away defenses formerly available and the right of action therein created is conditioned upon its enforcement within a prescribed period. The action not having been brought within such period designated by the statute, it is lost and the trial court ruled correctly in so holding."

See also Twonko v. Rome Brass Co., et al., 120 N. E. 638;

Brown v. Weston-Mott Co., et al., 168 N. W. 437.

Another reason why under the allegations in plaintiff's reply an estoppel cannot be set up is because the fraud and misrepresentations therein al-

leged were practiced upon a third person and not upon plaintiff herself or upon one who at that time was the agent of the plaintiff. Defendant, obviously, could not be bound by any negotiations alleged to have been conducted between defendant and Matt Rogulj, a third person, since the extent of his authority would have been to have filed a claim on behalf of the beneficiary, which, incidentally, could have been done by any person.

In view of the above authorities, the court did not err in sustaining the demurrer.

The second assignment of error refers to the ruling of the court in sustaining defendant's objections to the admission of evidence on the part of plaintiff to show that her address was different from the address given by Peter Rogulj, deceased, in his statement to defendant at the time he entered its employ.

The question involved was whether the defendant had complied with the statutory provisions requiring it to mail a notice to the person named as beneficiary in the employee's statement at the address given therein. The correctness of the beneficiary's actual address was not in issue.

The defendant had no obligation under the act to make independent inquiries to ascertain the correctness of the address given by the employee. If such address should happen to be erroneous, the resultant injury, if any, would be chargeable to the carelessness of the employee and not to the fault of defendant.

The only duty imposed upon defendant in this connection was to direct a notice to the beneficiary named in the employee's statement at the address specified therein and when defendant, as in this case, had made out, directed and mailed the notice, following the language of the statute in so doing, the defendant had fulfilled its obligation. Incidentally, the purpose of giving the notice by defendant was to afford plaintiff an opportunity to notify defendant she was the actual beneficiary and dependent upon the deceased, proof of which was not in the possession of defendant, its only information in this connection being contained in the deceased employee's statement. Furthermore, defendant was not required to see to it that its notice to plaintiff was, in fact, actually delivered to her.

Consequently the evidence offered in this connection was irrelevant and immaterial to the issue, and the objection to its introduction was properly sustained.

The third assignment of error relates to the ruling of the court in instructing the jury to return a verdict for the defendant.

It is charged that the defendant failed to produce and offer in evidence the written statement of Peter Rogulj. However, in view of the stipulation entered into on the part of plaintiff and defendant herein, which was received in evidence and which set forth the contents of the statement and admitted the facts therein stated to be true, plaintiff cannot be heard

to say it was necessary to offer this statement in evidence, or that the address given therein of plaintiff as at Podaca, Austria, was not true.

It is also charged that the proof failed to show that no claim had been filed by plaintiff or someone in her behalf. The testimony on the part of the defendant showed that no such written claim had been filed with either the general manager or the assistant manager, who had charge of defendant's operations and would have received the notice of claim had it been served. Counsel for plaintiff had an opportunity to cross-examine these representatives of the defendant for the purpose of ascertaining if, by any chance, the claim had been filed with any other employee of defendant over the age of eighteen years at its principal place of business. However, counsel did not see fit to do this; neither did he offer any testimony to prove that the notice had, in fact, been filed, as he should have done since the plaintiff had the burden of proof upon this point. (In re Murphy, 115 N. E. 40.) Furthermore, if the claim had been filed, counsel would have known about it. In view of these facts and also of the admissions in the pleadings, it is apparent that plaintiff actually served no such notice on the defendant.

The court, therefore, properly instructed the jury to return a verdict for defendant.

We respectfully submit that under technical rules of law, as well as broad principles of justice, the

judgment of the lower court herein should be in all respects ~~facts~~ affirmed.

Dated, February 19, 1923.

H. L. FAULKNER,
Attorney for Appellee.

W. S. BAYLESS,
Of Counsel.